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IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1968

SUPREME COURT, U.S.
MAR 20 1969
JOHN F. DAVIS, CLERK

ROSE WARREN
County of Kennebec and
State of Maine,
PETITIONER

vs

WATERVILLE URBAN RENEWAL AUTHORITY
a corporation organized under the
laws of Maine, and having its
principal place of business in
Waterville, County of Kennebec,
and State of Maine

* * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE STATE OF MAINE

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12 A.L.R. 3rd 1066 (anno)

20 AM. JUR (Evidence) # 787

20 AM. JUR (Evidence) #796

Your petioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court of the State of Maine.

OPINION BELOW

The opinion of the Supreme Judical Court of the State of Maine, filed November 21,1967, is reported at 235 Atlantic Reporter, Second series 294.

JURISDICTION

The judgment of the Supreme Judicial Court of the State of Maine was rendered on November 21, 1967 (app.1). The jurisdiction of the Court is invoked under 28 US Code 1257 (3).

STATEMENT

Rose Warren, a widow, owned land on both sides of Temple Court in Waterville, Maine with six wooden framed apartment buildings thereon.

Pursuant to a plan adopted by the Waterville Urban Renewal Authority, her land and buildings were taken by eminent domain. On April 7, 1964, she filed her action for her damages consequent upon the taking, in the Superior Court in and for the County of Kennebec, and State of Maine. A change of venue, authorized under 14 MRSA Section 508, transfered the case to Androscoggin County Superior Courthouse before a jury on December 20, 1965. The jury awarded the Plaintiff $60,000.00 as just compensation.

A motion for new trial was filed with the presiding justice of the Androscoggin County Superior Court and denied. On January 10, 1966, an Appeal by the Plaintiff, to the Supreme Judicial Court of the State

of Maine was filed following extensions of time, and points of appeal and designation of contents of the record were filed, September 20, 1966. A stipulation of counsel that the Urban Renewal Authority had offered but one witness at trial, was filed October 7, 1966.

At trial, this witness Heywood Sawyer a professional real estate appraiser, as sole witness for the Defendant, gave his opinion of the value of the land and buildings of the Plaintiff and testified that his opinion was based on comparables, the details of which he obtained from hearsay.

On cross examination, to the question, "...and if that hearsay is in error, you are in error?" Mr. Sawyer answered, "Yes, sir."

The nature of the hearsay upon which Mr. Sawyer based his opinion was as to the sale price, the dates of sales, the rental earned from said properties, and details as to whether said sales had been special sales or "forced

sales," and whether or not the purchasers in such instances had special need of purchasing in those instances. And Mr. Sawyer, by his own testimony, became the sole judge of the truth or falsity of the information thus given him by alleged owners or other parties having "witnessed" the sales, and he drew all inferences that he deemed necessary to make "adjustments" to what he estimated to have been the true price or "correct" market value. And upon all this, he predicated his opinion, as clearly testified to by him. And the basic "evidence" upon which Mr. Sawyer relied for his opinion, was not brought into the trial court; was not subject to cross examination or interrogation of any kind.

During the trial, that required several days, your petitioner's counsel advised the court and opposing counsel several times, the first such statement having been made on December 20, 1965, that Plaintiff would move to strike the testimony of Heywood Sawyer unless substantial supporting evidence was introduced, subject to cross examin-

ation to buttress Mr. Sawyer's opinion. No such evidence was introduced and your petitioner's counsel entered on the record, the following motion:

> "Plaintiff seasonably during trial made a motion to strike the expert opinion of Heywood Sawyer on the grounds that the basic hearsay facts upon which he based his opinion is not found in the evidence and, therefore, that his opinion is without supporting evidence."

The Court says:

> "The motion to strike is denied for, among other reasons, the same objection applied to much of the testimony given by Mr. Hobbs. In this case the court probably relaxed the hearsay evidence rules for both sides because it was necessary in view of the difficulties all of the experts encountered in such matters as getting satisfactory comparables, and so forth." (Appx. 38)

Following this, your petitioner's counsel entered an exception to the court's instructions as follows:

> "Now, an exception to the Court's instruction; by objection to that portion of the Court's charge that instructed the jury to consider Heywood Sawyer's opinion, it being without supporting evidence to be found in the case." (see record pp 344-5) (Appx. 37)

Your petitioner appealed to the Supreme Judicial Court of the State of Maine following verdict for the Plaintiff in the sum of Sixty Thousand Dollars ($60,000.00), and raised the following issues:

1. Was Heywood Sawyer's expert opinion admittedly based on hearsay, vulnerable to Motion to Strike for lack of supporting evidence?

2. Did the ruling of the trial court, denying Plaintiff's Motion to Strike, deprive the Plaintiff of her rights to due process under

the Federal Constitution of the United States?

3. Did the ruling of the Court denying the Plaintiff's requested instruction and permitting the jury to consider, in its deliberation, Heywood Sawyer's opinion, it being without supporting evidence to be found in the case, deprive the Plaintiff of her right to due process under the Federal Constitution of the United States?

4. Did the rulings of the Court both as to the admissions of the expert opinion of Heywood Sawyer and instructions to the jury deprive the Plaintiff of her rights to just compensation under the Constitution of the State of Maine?

5. Was the Plaintiff accorded a fair trial of her rights to just compensation, as guaranteed her by the Constitution of the State of Maine?

6. Was the Plaintiff accorded a fair trial of her rights to just compensation guaranteed her

under the due process clause of the Federal Constitution of the United States? (see record - - Plaintiff's Brief in lower court, pp 3.) (Appx. 39)

The decision of which review is hereby sought, stated that your petitioner's counsel either tacitly agreed to, or agreed, or accepted benefits of an agreement, or somehow waived your petitioner's Constitutional right to a trial according to the course and procedure of the common law, to which the Constitution of the United States assures her. Your petitioner says that there is no such evidence and that there is nothing in the record to support such a finding or statement.

Plaintiff's witnesses set the value of the land and buildings at over One hundred thousand dollars ($100,000.00) and the value of the land at from

three dollars ($3.00) to three dollars and fifty cents ($3.50) per square foot. The Defendant's sole witness, Heywood Sawyer, says the value of the land is approximately twenty eight cents ($.28) a square foot. Over twenty one thousand (21,000) square feet are involved.

DECLARATION OF RIGHTS Art. I § 21

§ 21. Private property, when to be taken

Section 21. Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

Your petitioner was entitled to just compensation under the Constitution of Maine.

But, the failure of the judiciary to adhere to the requirements of due process has resulted in a substantial monetary loss to your petitioner, impairing her vested rights to just compensation.

QUESTIONS PRESENTED

The decisional law of Maine has adhered to the common law and held that hearsay evidence has no probative value and that it would not sustain a verdict lacking other support. (app.41 - 43and 46)

1. The Maine court, in its decision in this case has departed from this common law principle and now says that unsupported hearsay evidence can support a verdict, under guise of changing the rules of evidence or procedure in deprivation of your petioner's substantial vested rights. Does this violate your petioner's constitutional rights under Article 1 # 10 and of the 7th and 14th amendments to the Federal Constitution? (app. 44)

2. The decision of the Supreme Judicial Court of Maine of which review is hereby sought, states in this decision

that your petioner, through her counsel, agreed to or passively agreed to, or waived her constitutional rights to due process and to her constitutionaly protected right to trial according to the course of the common law, and rights of contract; seeking compensation for the property taken from her by eminent domain. Your petioner says that the record is devoid of any evidence, or of any substantial evidence, to support such finding of agreement or waiver. Does this violate your petioner's constitutional rights under Article 1 # 10 and of the 7th and 14th amendments to the Federal Constitution? (app.44)

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Judicial Court of Maine, in instant case, is in conflict with this Court's decision in Donnelly vs United States, 228 U.S. 243, 57 Law Ed. 820.

This was a criminal case and at page 834 of the decision this Court, through Chief Justice Marshall said that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proven by witnesses who speak from their own knowledge, and that all questions upon rules of evidence are of vast importance to all orders and degrees of men; "our lives, our liberty and our property are all concerned in the support of these rules." This Court went on to say that the admission of hearsay evidence is sufficient "to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all."

Professor Wigmore, in developing the history of the hearsay rule, tells us that historically and at common law, the rules of evidence in the civil side of the law did not differ and should not, on principle, from those of the criminal side of the law. Indeed, whenever squarely faced with a pronouncement on that distinction, no court has held to the contrary. (App. 45)

In Chicago . . . R. Co. vs Chicago, 166 U.S. 226, this Court held that it may examine proceedings had in a state court under state authority for the appropriation of private property for public purposes so as to inquire whether that court prescribed any rules of law in disregard of the owner's right to just compensation.

The decision of the Maine Court sought to be reviewed here, changed the rules of substantive law, under guise of changing the rules of evidence and procedure, impairing your petitioner's vested rights. The Defendant armed with the right and power to take property by eminent domain, actually entered

into a contract with your petitioner, dictated by law; the contract being that for her property, the Defendant would pay her just compensation. When the Supreme Judicial Court of Maine made the findings and changed the substantive law it impaired your petitioner's rights of contract and denied her due process in the trial of her contractural right to money, resulting in her not receiving just compensation.

There are several Federal questions here. First, the question of the waiver of Constitutional protections; Second, the change of the substantive law by the Supreme Judicial Court of Maine impairing your petitioner's rights to due process; and Third, on the same facts, the impairment of the obligations of contract.

As to waiver, this court has held in Brookhart v Janis (384 U.S. I) that there is a presumtion against waiver of constitutional rights.

As to the change of substantive law effected by the Maine Court decisions sought to be reviewed, where vested rights are concerned, this Court has repeatedly held that such changes could not be countenanced under guise of changing rules of evidence or procedure.

The court below justifies its decision on the grounds that if the witnesses required to establish comparable sales were called, it would lengthen litigation and that its ruling guarantees "against the proliferation of collateral issues." Only five additional witnesses would have been required in this case!"

Evidence--hearsay evidence though admitted without objection, known as "consent evidence" does not acquire probative value if it had none when offered. And, it is not consent evidence, if it is not objected to, as here, and offered as a mere basis for an opinion and not as substantive evidence.

Maine decisions have uniformly upheld the common law to the effect that hearsay evidence, not within any exception of the general rule, have no probative force and will not sustain a verdict lacking other support. Maine has so held in Shaw vs. McKenzie 131 Me 248; Goldthwaite vs. Sheraton Restaurant, 154 Me 214, and all of its other decisions have so consistently held. In instant decision, however, without overruling any of the principles previously established, as set out above, the Maine Court in effect established a new exception to the hearsay rule, contrary to this court's holding in Queen vs. Hepburn, 7 Cranch 290: (3 L ed 348).

This court has denied certiorari on similar questions. This case is distinguishable from those cases where the court denied certiorari in that the verdict, or judgment, is supported by only <u>one</u> witness who himself admitted on cross examination that his testimony was squarely based on hearsay. (Appx. 34)

This case is of great importance because there is now in the courts of this country, a tendency to overlook violations of the strict hearsay rule in the interest of expediting cases through the courts. The annotation at 12 ALR 3d, 1066 Section 2, treats this problem and at page 1066 suggests that "if it can be economically done, it is preferable to present substantive evidence of such sales by direct testimony of the parties involved, and it is probably a mistake to attempt to take the easy way. . ." The easy way is to erode Constitutional rights. This petitioner is not aware of any decision of this court that would sanction new exceptions to the hearsay rule, however expeditious, in this kind of case. This court has repeatedly upheld the right to trial according to the course of the common law, and/or to due process.

And due process is violated if courts can declare the existence of probative value where non existed at common law.

This is not a complex case. In Maine, an owner in eminent domain proceedings, is the Plaintiff and has the burden of going forward with the evidence. The comparables to be relied upon by an expert witness are considered as "work product" and not subject to discovery. And though it was subject to discovery, nothing precludes a witness from selecting several "comparables" not previously disclosed and recompute on those and arrive with a similar opinion. The Plaintiff must necessarily remain blind, without notice and completely uninformed as to which comparables the "expert witness" will use, until he actually testifies in open court.

Now, under the present ruling, he can use hearsay testimony and give his opinion based thereon. The Plaintiff is denied not only the right to compensation and cross examination of the factual source but can receive no adequate pretrial information because the witness can simply shift

his comparables from one end of the city to the other if he wishes. The common law principle was that hearsay evidence, alone, could not support a verdict of judgment. Or, stated another way, it had no probative force. This effectively closed the door to the type of situations just outlined. Now, that door is reopened in Maine. All the bitter lessons learned by our society in the evolvement of our cherished common law is now swept away, at least in Maine. We are no longer fearful of fraud and the perjury and the errors that fostered the rule. The court below would now substitute the sound discretion of the trial court in determining whether the hearsay information "is derived from sources fairly trustworthy. . ." What powers a trial court may have, to determine this delicate question, without confrontation, without hearing the cross examination of these 'sources' is something the court below does not explain.

Finally, and most important, the lower court lays great stress on the fact that Mr. Heywood Sawyer had "personal observation" of the properties involved of the comparables that he selected. However, Mr. Sawyer does not utilize any of the information obtained by him through observation for his opinion. He states categorically, squarely, and without reservation whatever, that his opinions are squarely based on hearsay evidence;

QUESTION-. . ."How did you arrive at the rental values of the comparable properties?"

ANSWER-. . . "I asked the people what their rent was."

QUESTION-. . ."So, if they didn;t give you the right information. . . "

ANSWER-. . ."I would be off base."

QUESTION-. . ."So, you are depending entirely on hearsay?"

ANSWER-. . ."yes."